BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DARIN N. REED	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,009,349
WAL-MART	)	
Respondent	)	
AND	)	
	)	
AMERICAN HOME ASSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the March 2, 2007, Award entered by Administrative Law Judge Bruce E. Moore. The Workers Compensation Board heard oral argument on June 5, 2007.

APPEARANCES

John Sherman of Ellsworth, Kansas, appeared for claimant. James B. Biggs of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

On September 22, 2002, claimant fractured his skull when he fainted and fell at work after striking his leg on a tire balancing machine. The issue presented to the Judge was whether claimant's accident arose out of horseplay or whether it arose out of his work duties. In the March 2, 2007, Award, Judge Moore determined claimant's accident resulted from horseplay. Consequently, the Judge denied claimant's request for workers compensation benefits.

Claimant contends Judge Moore erred. Claimant denies he was engaged in horseplay immediately before his fall. Instead, claimant argues he struck his foot and leg

on the tire balancing machine when he attempted to slow the rotating tire and stop its rotation so that weights could be applied. In short, claimant insists he was helping a co-worker when he banged his foot and leg on the balancing machine. Accordingly, claimant requests the Board to reverse the March 2, 2007, Award and grant him benefits.

Conversely, respondent and its insurance carrier contend the Award should be affirmed. They argue claimant's accident resulted from horseplay as he was attempting to throw off the balancing machine's readings when he banged his leg on the machine. Accordingly, respondent and its insurance carrier contend the September 2002 accident did not arise out of claimant's employment.

The only issue before the Board on this appeal is whether claimant's September 2002 accident arose out of his employment with respondent or whether it arose out of horseplay.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board concludes claimant's accident arose out of horseplay and, therefore, the Award should be affirmed.

Claimant worked for respondent in its tire and lube department in a store in Hays, Kansas. On September 22, 2002, claimant fractured his skull when he fainted and fell after striking his leg on a tire balancing machine. As a result of his injuries, claimant incurred thousands of dollars of medical expenses.

The Judge did an excellent job of setting forth his findings and conclusions. The Board adopts the Judge's findings and conclusions as its own with the exception that there was evidence presented that indicated it was customary for respondent's employees to use their feet to slow a rotating tire.[1] In summary, the Board finds the greater weight of the evidence establishes that claimant's accident occurred when he tried to throw off readings on the tire balancing machine by touching or tapping a spinning tire while the machine's protective hood covered the tire. Contrary to claimant's assertions, the evidence does not establish that he was assisting the operator of the balancing machine by attempting to slow the tire to stop its rotation when his foot and leg struck a metal frame on the machine.

We cannot know with certainty what claimant was thinking when he placed his foot on the spinning tire, but the best evidence comes from co-worker Derek Huber, the person who was operating the tire balancing machine at the time of claimant's accident. Mr. Huber

[1] Huber Depo. at 20, 21.

testified that immediately after claimant's foot and leg struck the machine claimant stated he was trying to kick the spinning tire to throw off the machine's readings. There is nothing in the record to indicate Mr. Huber had any bias or prejudice against claimant or, for that matter, any incentive to either lie or otherwise shade his testimony. Moreover, the October 4, 2002, medical records of claimant's personal physician, Dr. Ronald Whitmer, show a history that claimant was injured after he "kicked tire at work . . . & foot caught & thrown into plastic/metal guard making him fall hitting head."[2]

At one point claimant argued that the outcome of this claim should depend upon whether respondent deemed claimant's actions horseplay. And because respondent did not reprimand claimant for horseplay, there was no horseplay for purposes of this claim. But that is not the law. Indeed, the personnel actions that respondent took following the accident are irrelevant in determining whether claimant's actions at the time of the accident constituted horseplay.

Claimant has failed to prove his accident arose out of his employment. In addition, the evidence does not establish that respondent knew that such horseplay was occurring and permitted it to continue. Consequently, claimant's accident is not compensable under the Workers Compensation Act.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[3] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the March 2, 2007, Award entered by Judge Moore.

IT IS SO ORDERED.

[2] Whitmer Depo., Ex. 1.

[3] K.S.A. 2006 Supp. 44-555c(k).

Dated this ____ day of June, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John Sherman, Attorney for Claimant
James B. Biggs, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge